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J.P. Phillips, Inc. Employer and Operative Plasterers and Cement Masons International Association, Local 5, AFL-CIO Petitioner and International Union of Bricklayers & Allied Craftworkers, Locals 56 & 74, AFL-CIO. Case 13-RC-20544

December 17, 2001

DECISION AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

The National Labor Relations Board, by a three-member panel, has considered objections to a mail ballot election held April 9, 2001, through April 23, 2001, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Decision and Direction of Election. The tally of ballots shows 31 for the Petitioner, 10 for the Intervenor,¹ and 2 for neither, with 2 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and brief and has decided to adopt the hearing officer's findings and recommendations only to the extent consistent with this Decision and Direction of Second Election, and finds that the election must be set aside and a new election held.²

Intervenor's objections Nos. 1-3 allege that there were irregularities regarding the submission of the required *Excelsior*³ list. In support of these objections, the Intervenor contends, inter alia, that it received, via facsimile (fax) from the Region, an incomplete *Excelsior* list, and later received, via mail from the Region, an untimely *Excelsior* list. The Intervenor argues that the Petitioner possessed a complete list for a significantly longer period of time than the Intervenor did.

The relevant facts are as follows. An election petition was filed on February 2, 2001,⁴ and a Decision and Direction of Election was issued on March 14. On March 21, the Employer provided the Regional Director with a list containing the names of employees eligible to vote in

the election. Contrary to the *Excelsior* requirements, however, this list did not contain the employees' addresses. Nonetheless, the Region faxed this list to the parties through their counsel that same day. On March 22, the Employer submitted a revised list to the Region. The hearing officer correctly found that this list substantially complied with the *Excelsior* requirements. On March 23, the Region faxed the March 22 list to the parties' counsel. However, the Intervenor contends, and the hearing officer found, that the faxed list received by the Intervenor on March 23 was incomplete, because the fax did not include the third page of the three-page list. The Petitioner received a complete list via fax on March 23.

On March 29, the Region mailed to the parties' counsel and the local unions complete copies of the March 22 list. At the hearing, the parties stipulated that Bricklayers Local 74 received this mailed list on March 30, while Bricklayers Local 56 received its copy on April 2. As stated above, the election was conducted on April 9 through April 23.

The hearing officer recommended, inter alia, overruling Intervenor's objections regarding the *Excelsior* list. She found that, even though both Bricklayers locals did not receive a complete *Excelsior* list on March 23, the fact that the list was "obviously incomplete" should have led the Intervenor to "take affirmative steps to obtain additional copies of the March 22" list. The hearing officer also found that the Intervenor did not need the *Excelsior* list for its campaign because evidence showed that the Intervenor was able to contact digible voters without the list. Finally, the hearing officer found that, because Bricklayers Local 74 received a complete copy of the *Excelsior* list in the mail on March 30, the Intervenor had the list 10 days before the election, and, thus, there was no reason to set aside the election. For the reasons discussed below, we reverse the hearing officer and set aside the election.

Under *Excelsior*, an employer must submit a list of employees who are considered eligible to vote in an election to the Regional Director within 7 days after the approval of an election agreement or the issuance of a decision and direction of election. *Excelsior Underwear, Inc.*, supra at 1239-1240. The list must contain employees' names and addresses. Id. After an employer provides the Regional Director with the list, "[t]he Regional Director . . . shall make this information available to all parties in the case. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed." Id. at 1240. See generally NLRB Casehandling Manual (Part Two) Representation Proceedings, Sec.11312.1.

¹ The Intervenor in this case is International Union of Bricklayers & Allied Craftworkers Locals 56 and 74 (Bricklayers).

² We adopt the hearing officer's recommendation to overrule the Intervenor's objections relating to alleged irregularities regarding the mail balloting procedure.

³ *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966).

⁴ All dates refer to 2001, unless otherwise indicated.

The *Excelsior* rule is designed “to achieve important statutory goals by ensuring that all employees are fully informed about the arguments concerning representation and can freely and fully exercise their Section 7 rights.” *Mod Interiors*, 324 NLRB 164 (1997), citing *North Macon Health Care Facility*, 315 NLRB 359, 360–361 (1994). “The *Excelsior* rule helps achieve this goal of ‘an informed employee electorate’ by giving unions the right of access to employees that employers already have, thus enabling employees to hear” from all parties on the unionization question. *Special Citizens Futures Unlimited*, 331 NLRB No. 19 (2000), slip op. at 2, citing *Thiele Industries*, 325 NLRB 1122 (1998). These principles hold true equally where two unions are competing to represent employees.

Regarding the delayed receipt of an *Excelsior* list, “the relevant inquiry is whether the delay — however caused — interfered with the purpose behind the *Excelsior* requirements of providing employees with a full opportunity to be informed of the arguments concerning representation, so that they can fully and freely exercise their Section 7 rights.” *Alcohol & Drug Dependency Services*, 326 NLRB 519, 520 (1998)(footnote omitted), citing *Mod Interiors*, supra. “It is extremely important that the information in the *Excelsior* list be not only timely but complete and accurate so that the union may have access to all eligible voters.” *Mod Interiors*, supra. Finally, “tangible evidence” of prejudice to a party who did not timely receive an *Excelsior* list is not required. *Alcohol & Drug Dependency Services*, supra at fn. 8.

Here, we find that the Intervenor’s delayed receipt of a complete *Excelsior* list can be attributed to the Region. As stated above, the March 22 list faxed by the Region to the Intervenor on March 23 was incomplete because the fax did not include a necessary page containing approximately 48 names and addresses. (There were 102 eligible employees dispersed over different locations.) Thus, the Region failed to send successfully a complete list to the Intervenor. The Petitioner, however, received, via fax, a complete copy of the March 22 list on March 23.

And, as stated above, the hearing officer essentially found that, although the list faxed to the Intervenor was incomplete, the Intervenor did not need the list because, first, it did not take affirmative steps to procure a complete list, and, second, it was contacting eligible employees without the benefit of a complete list.

We disagree with this conclusion. First, it is well established that “[t]he *Excelsior* requirement applies to all elections, and a union’s ability or inability to obtain the *Excelsior* information through alternative means in no way affects or substitutes for the *Excelsior* require-

ments.” *Alcohol & Drug Dependency Services*, supra fn.8.

Second, the duty to send an *Excelsior* list to the parties lies squarely with the Region. See Section 11312.2 of NLRB Casehandling Manual (Part Two) Representation Proceedings: “Immediately upon receipt [of the list from the employer], the Regional Director should mail the list to all labor organizations or individual petitioners involved.” In the circumstances of this case, the Intervenor was under no obligation to take affirmative steps to procure a complete list. The nonconforming list of March 21, which had been faxed to the Intervenor on that same date, contained significantly fewer names than the conforming list (or the incomplete list faxed to the Intervenor on March 23). Thus, contrary to the hearing officer, it is not at all clear that the Intervenor would have, or should have, recognized that it had received an “obviously incomplete” list on March 23.

Finally, contrary to the hearing officer, the fact that one of the Bricklayers locals ultimately received a complete *Excelsior* list in the mail 10 days before the beginning of the election is not determinative. Section 11302.1 of NLRB Casehandling Manual (Part Two), Representation Proceedings states that an election “may not be held sooner than 10 days after” the Regional Director has received the *Excelsior* list. But “[t]his provision merely directs that the Board will give the petitioner an opportunity to make use of the list for at least 10 days before conducting the election.” *Mod Interiors, Inc.*, supra. (Emphasis added.) As stated above, the decision and direction of election issued on March 14. The Employer submitted a conforming list to the Region on March 22. Thus, all parties could have had the list for almost 3 weeks before the election instead of the mere 10-day minimum.

What is determinative here is that, because the Petitioner received a complete *Excelsior* list on March 23, it had the list for 7 days longer than Bricklayers Local 74 had the list, and 10 days longer than Bricklayers Local 56 had the list. Due to the Region’s failure to send a complete *Excelsior* list to the Intervenor on March 23, the Petitioner possessed the list significantly longer. This disparity placed the Intervenor at an obvious disadvantage and on its face interfered with employees’ “full opportunity to be informed of the arguments concerning representation, so that they can fully and freely exercise their Section 7 rights.” *Special Citizens Futures Unlimited*, supra, slip op. at 2. See also *Alcohol & Drug Dependency Services*, supra, at 520 (disparity “interfered with the purpose behind the *Excelsior* requirements of providing employees with a full opportunity to be in-

formed of the arguments concerning representation. . .”). Accordingly, we shall set aside the election.

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board’s Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during the period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the election date and who retained their employee status during the eligibility period and their replacements. Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by Operative Plasterers and Cement Masons International Association, Local 5, AFL–CIO, by International Union of Bricklayers & Allied Craftworkers, Locals 56 & 74, AFL–CIO, or by neither.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election if proper objections are filed.

Dated, Washington, D.C. December 17, 2001

Wilma B. Liebman,

Member

Dennis P. Walsh,

Member

(SEAL) NATIONAL LABOR RELATIONS BOARD
CHAIRMAN HURTGEN, concurring.

I concur. I write separately, however, to emphasize that this case differs from *Alcohol & Drug Dependency Services*, 326 NLRB 519 (1996), a case in which I dissented.

In *Alcohol & Drug Dependency Services*, two “delays,” both of which were attributable to the Region, resulted in the union’s untimely receipt of the *Excelsior* list. First, the Region erroneously directed the employer to provide it with the list by October 31, rather than by October 30. Second, although the Region received the list from the employer on October 31, it waited until November 3 to mail it to the union. As a result of the Region’s errors, the union did not receive the list until November 5, five days before the election. The majority found that these delays justified setting aside the election.

In my dissent, I stated, inter alia, that, “[w]here . . . delays [regarding receipt of an *Excelsior* list] are not attributable to the Employer, the Board will set aside the election only if the Union can show that it was materially prejudiced by the delay.” 326 NLRB at 520. In *Alcohol & Drug Dependency*, there was no showing of material prejudice.

Like *Alcohol & Drug*, the instant case involves an error by the Region, not by the Employer. However, unlike that case, there is prejudice to one of the two competing unions.¹ On March 22, the Employer submitted a valid *Excelsior* list to the Region. On March 23, the Region faxed the three-page list to the parties. The Petitioner received the complete list. However, due to an error in the Region’s transmission, the Intervenor received only two pages of the list. Thus, it did not receive 48 names and addresses (out of 102). On March 29, the Region mailed a complete copy of the list to the parties. One Intervenor local received this list on March 30. The other Intervenor local received its copy on April 2. The mail ballot election was held from April 9 through April 23.

In sum, the Petitioner received the complete list 7-10 days before the Intervenor received it.² It is clear that the *Excelsior* list is very important for purposes of com-

¹ The unions are Plasterers Local 5 (Petitioner) and Bricklayers Locals 56 and 74 (Intervenor).

² That is, as noted, one Local of the Intervenor received the list on March 30 and the other received it on April 2.

municating with employees. In light of this, it seems apparent to me that a union that has the list 7-10 days before its rival is blessed with a significant advantage. The rival is at a concomitant disadvantage, and is substantially prejudiced vis -à-vis the other union. In light of this, and in view of the Board's compelling interest in assuring fairness and the appearance of fairness in elections, I join my colleagues in setting aside the election.

Dated, Washington, D.C. December 17, 2001

Peter J. Hurtgen, Chairman

(SEAL) NATIONAL LABOR RELATIONS BOARD